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No. 01-1545

Supreme Court, U.S.
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In The
Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, *et al.*,

Petitioners,

v.

ARECIBO COMMUNITY HEALTH CARE, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, DELAWARE, FLORIDA, IDAHO, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WYOMING AND TERRITORY OF THE VIRGIN ISLANDS IN SUPPORT OF COMMONWEALTH OF PUERTO RICO

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CONSTITUTION

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INTEREST OF AMICI CURIAE

Amici curiae file this brief in support of Puerto Rico's petition for certiorari to review the decision of the First Circuit in *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17 (1st Cir. 2001). In that decision, the court of appeals ruled that the Commonwealth necessarily waived its immunity to a debtor's counter-suit for positive relief by filing a claim against the debtor's bankruptcy estate. The decision has obvious implications for all of Amici States who must daily avail themselves of the processes of the bankruptcy courts in order to safeguard the interest of taxpayers in the assets of bankruptcy estates.

Amici contend that the sovereign immunity guaranteed them by the Eleventh Amendment is no less protective against counter-suits than is the sovereign immunity enjoyed by Indian tribes and the United States. The only legal consequence of filing a claim in bankruptcy court should be that the claim is allowed or disallowed. The only financial consequence to a State of filing a claim in bankruptcy court should be that the claim is paid or not paid in whole or in part. Amici respectfully submit that Puerto Rico's petition for certiorari should be granted to make that clear.

SUMMARY OF ARGUMENT

On three occasions, this Court has recognized that, by merely prosecuting a claim to protect the assets of its constituency, a sovereign does not thereby waive its immunity to counter-suits. *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512-513 (1940); *United States v. Shaw*,

309 U.S. 495 (1940); and *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991). None of those cases involved assertions of sovereign immunity by States or by the Commonwealth of Puerto Rico, but Amici contend that the principles in those cases are applicable with equal vigor to bar counter-suits for positive relief prompted by the filing of claims in bankruptcy court.

The First Circuit did not consider the effect of *U.S. Fidelity Co., Shaw,* or *Potawatomi Tribe* on Puerto Rico's claim of immunity from counter-suit in bankruptcy proceedings. This Court should, therefore, grant Puerto Rico's petition to confirm that the sovereign immunity to suit embodied in the Eleventh Amendment is not different from that enjoyed by the United States and Indian tribes, such that neither a State nor Puerto Rico surrenders its immunity to counter-suit for positive relief merely by filing a claim in bankruptcy court. Indeed, the Court should grant the petition because dicta in the Court's recent decision in *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U.S. ___, 122 S.Ct. 1640, 2002 WL 970637 (May 13, 2002), could be read to suggest precisely to the contrary.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED TO SETTLE ANY DOUBT THAT THE MERE FILING OF A CLAIM IN BANKRUPTCY FOR THE PROTECTION OF TAXPAYER ASSETS DOES NOT CONSTITUTE A WAIVER OF ELEVENTH AMENDMENT IMMUNITY TO COUNTER-SUIT FOR POSITIVE RELIEF

It has long been recognized that, by virtue of their inherent sovereignty, neither the United States nor an Indian Tribe waives immunity to suit merely by prosecuting a claim in court for the protection of taxpayer or tribal assets. In *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512-513 (1940), the Court held that the United States' claim in bankruptcy on behalf of an Indian tribe does not waive the immunity of either the United States or the tribe from counter-suit for a positive recovery. On the same day, the Court held in *United States v. Shaw*, 309 U.S. 495, 501-504 (1940), that the United States' claim in a probate case does not waive immunity from counter-suit. More recently, in *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 509-510 (1991), the Court held that the filing by an Indian tribe of a civil action to enjoin assessment and collection of state taxes does not waive the tribe's immunity from a counter-suit in that action.

The First Circuit in the proceedings below, however, has ruled that the Commonwealth of Puerto Rico waived its immunity to a counter-suit for positive relief by filing a claim in bankruptcy proceedings for the protection of

taxpayer monies.[1] The court reasoned that the Commonwealth's choice to avail itself of the aid of the bankruptcy court amounted to an affirmative waiver of immunity, distinguishable from the "constructive waiver" rejected in *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999). The court's analysis omits any reference whatsoever to this Court's seminal decision in *United States v. U.S. Fidelity Co.* and the principles articulated therein. In particular, the circuit court failed to appreciate the distinction between a waiver of immunity for purposes of "objection" to a State's claim, *see Gardner v. New Jersey*, 329 U.S. 565, 572-575 (1947), and a counter-suit by the debtor for positive relief. The analysis in *U.S. Fidelity Co.*, would not bar a set-off of a sovereign's claim by amounts found to be owed to the debtor in bankruptcy; but *U.S. Fidelity* does bar a counter-suit for positive relief.

The First Circuit's reasoning notwithstanding, Amici respectfully submit that the filing of a claim in bankruptcy cannot reasonably be considered an affirmative, unequivocal waiver of immunity to counter-suit. When a creditor files bankruptcy, the States – like the United States and Indian tribes – have no means to safeguard taxpayer interest in the bankruptcy estate except to avail themselves of the processes of the bankruptcy court. It follows, then, that States – no less than the United States and Indian tribes – must have an opportunity to participate in those processes without being deemed thereby to have waived their Eleventh Amendment immunity to counter-suits for

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[1] The circuit court acknowledged that Puerto Rico enjoys immunity from suit under the Eleventh Amendment. *Arecibo Community Health Care, Inc.*, 270 F.3d at 21, fn. 3.

positive relief by the debtor. As this Court noted: "The sovereignty possessing immunity should not be compelled to defend against cross-actions . . . *in courts not of its choice*, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent." *United States v. U.S. Fidelity Co., supra*, 309 U.S. 506, 513 (emphasis added). Amici therefor urge the Court to grant Puerto Rico's petition to settle this important question of federal law.

While it may be conceded that neither *U.S. Fidelity Co., Shaw* nor *Potawatomi Tribe* involved a claim of *state* sovereign immunity, nevertheless, under any rational analysis, the rule articulated by the Court in *U.S. Fidelity Co.* should be just as applicable to the inherent sovereignty of the several States as it is to the inherent sovereignty enjoyed by the United States or by Indian tribes.[2] This Court observed, in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), that:

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, [citations]; and that a State will therefore not be

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[2] Indeed, the immunity enjoyed by Indian tribes is that of a "dependent" sovereign. *See Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.")

> subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Id. at 779. More recently, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court acknowledged that the phrase "Eleventh Amendment immunity" is:

> convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

527 U.S. at 712-713; *accord*, *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. ___, ___ (slip opn., pp. 6-7, 14, 20) (May 28, 2002). This Court has "recognized a correlation between sovereign immunity principles applicable to the States and the Federal Government." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998); *see also, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 682 (federal sovereign immunity is "obviously the closest analogy" to state sovereign immunity). Such a near identity of bases for sovereign immunity reasonably warrants extension of the *U.S. Fidelity Co.* rule to encompass Eleventh Amendment immunity.

II

REVIEW SHOULD BE GRANTED TO CLARIFY THAT DICTA IN THIS COURT'S RECENT DECISION IN *LAPIDES v. BOARD OF REGENTS* SHOULD NOT BE READ TO DENY STATES THE FULL IMMUNITY FROM COUNTER-SUIT THAT IS ENJOYED BY THE UNITED STATES AND INDIAN TRIBES PURSUANT TO *U.S. FIDELITY CO.*, *SHAW*, AND *POTAWATOMI TRIBE*

In *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U.S. ___, 122 S.Ct. 1640, 2002 WL 970637 (May 13, 2002), the Court held that a State's act of removing a lawsuit from state court to federal court waives the State's Eleventh Amendment sovereign immunity. In the course of its analysis, the Court had occasion to address Georgia's reliance on *U.S. Fidelity Co.*, *Shaw*, and *Potawatomi Tribe*:

> The State makes several other arguments, none of which we find convincing. It points to cases in which this Court has permitted *the United States* to enter into a case voluntarily without giving up immunity or to assert immunity despite a previous effort to waive. See *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *United States v. Shaw*, 309 U.S. 495 (1940); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991). Those cases, however, do not involve the Eleventh Amendment – a specific text with a history that focuses upon the State's sovereignty vis-a-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (i.e., the United States) to seek the protection of its own courts (i.e., the federal courts), or an effort to protect an Indian tribe.

> Slip opn., p. 9; 2002 WL 970637, p. 5 (emphasis in original.)

The present case does indeed involve "an effort by a sovereign" (*i.e.*, the Commonwealth of Puerto Rico) "to seek the protection of its own courts" (*i.e.*, the commonwealth courts). Puerto Rico filed its suit against the debtor in the Superior Court of Puerto Rico, 270 F.3d at 21, but was thwarted in that effort by the debtor's initiation of bankruptcy proceedings. Endeavoring to protect the interests of its citizens in the consequent bankruptcy estate, the Commonwealth took the reasonable and proper action of filing its claim in the bankruptcy court. Puerto Rico thus "invoked" the jurisdiction of the federal court for one purpose, and for one purpose only – to allow or disallow that claim.

Unlike the State of Georgia in *Lapides*, Puerto Rico did not invoke the jurisdiction of a federal court to hear its defenses to someone else's suit, for the suit against Puerto Rico had not even been brought when Puerto Rico filed its claim. By removing a pending state-court suit against it to federal court, Georgia was effectively a voluntary defendant. The Court thus quite correctly observed that neither *U.S. Fidelity, Shaw*, nor *Potawatomi* was germane to Georgia's situation. None of those cases purports to preserve sovereign immunity where the sovereign effectively invites adjudication of the dispute in a tribunal outside the jurisdiction of the sovereign's consent.

However, the articulated bases on which this Court distinguished *U.S. Fidelity, Shaw,* and *Potawatomi Tribe*, quoted above, could be read to suggest that the principles of sovereign immunity developed in those cases have no application to Eleventh Amendment claims by States (or

Puerto Rico) to counter-suits. But as discussed above, the Court's reasoning in those three earlier cases should apply with equal vigor to encompass state assertions of sovereign immunity to counter-suits in bankruptcy. The Court should, therefore, grant Puerto Rico's petition to clarify the meaning of its dicta in *Lapides*.

CONCLUSION

Under any reasonable analysis, the rule recognized in *United States v. U.S. Fidelity Co.*, *Shaw*, and *Potawatomi Tribe* – that a sovereign's claim in a bankruptcy case does not waive the sovereign's immunity from counter-suit for a positive recovery – should apply as much to Eleventh Amendment immunity as it does to the sovereign immunity of an Indian tribe or the United States. The decision of the First Circuit below is utterly inconsistent with that rule.

For these reasons articulated herein, the Court should grant Puerto Rico's petition for a writ of certiorari.

Respectfully submitted,

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